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# CERTIFICATE.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1900~~ 1902.

No. ~~302~~ 85.

C. ELLIOTT & CO. ET AL., APPELLANTS,

*vs.*

FERDINAND TOEPPNER.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED APRIL 22, 1901.

(18,126.)

(18,126.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1901.

No. 302

C. ELLIOTT & CO. ET AL., APPELLANTS,

*vs.*

FERDINAND TOEPPNER.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1902.

1 United States Circuit Court of Appeals, Sixth Circuit. In Bankruptcy.

C. ELLIOTT & CO. ET AL., Appellants, v. FERDINAND TOEPPNER, Appellee. } No. 843. Appeal from the District Court of the United States for the Eastern District of Michigan.

The appellants on September 30, 1899, filed in the district court of the United States for the eastern district of Michigan a petition for the adjudication of Ferdinand Toeppner as a bankrupt, which said petition was in these words and figures:

"To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan:

"The petition of Clifford Elliott, William E. Saunders, William T. Radcliffe and Edward W. Reynolds, general partners doing business as C. Elliott & Company, Albert H. Krum, doing business as A. H. Krum & Co., Albert W. Schloss and Murray S. Schloss, copartners as Schloss Brothers, George C. Wetherbee & Co., a corporation organized under the laws of the State of Michigan, and Phelps, Brace & Co., a corporation organized under the laws of the State of Michigan, respectfully shows:

"1. That Ferdinand Toeppner, of the village of Utica, Macomb county, Michigan, has for six months and more next preceding the date of filing this petition, resided and had his domicile and his principal place of business at the said village of Utica, Macomb county, Michigan, within the eastern district of Michigan, and that he owes debts to the amount of more than one thousand dollars, to wit, seven thousand dollars.

"2. That your petitioners are creditors of said Ferdinand Toeppner, having provable claims amounting in the aggregate in excess of securities held by them, to the sum of more than five hundred dollars; that the nature and amount of your petitioners' claims are as follows: C. Elliott & Co., wholesale grocers, merchandise,
2 $187.53; Albert H. Krum, wholesale rubbers, boots and shoes, merchandise, $63.75; Schloss Brothers, wholesale clothing, merchandise, $450.50; George C. Wetherbee & Co., woodenware, etc., merchandise, $63.16; Phelps, Brace & Co., wholesale grocers, merchandise, $64.24. That your petitioners all have their principal places of business within the said eastern district of Michigan, to wit, at the city of Detroit, Michigan. That none of your petitioners hold any security, whatever, for any of their above-described claims, or any part thereof, nor any promissory note or other commercial paper therefor.

"3. And your petitioners further represent that said Ferdinand Toeppner is insolvent, and that within four months next preceding the date of this petition the said Ferdinand Toeppner committed acts of bankruptcy within the meaning of the act of Congress, en-

titled, 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as follows:

"(*a.*) That heretofore, to wit, on the thirty-first day of July, 1899, while insolvent, he executed a chattel mortgage to William Schloesler, of Sterling township, Macomb county, Michigan, in the sum of one thousand dollars, which chattel mortgage covered and conveyed all the stock, property and fixtures of the said Ferdinand Toeppner contained in his store building on the east side of Main street, in the village of Utica, consisting of dry goods, clothing, boots and shoes, china and crockery ware, groceries and provisions, cigars, tobacco and all shelving, counters, chairs, desks, tables, show-cases, stoves, lamps and other fixtures contained in said building; also one horse, one phaeton, one end spring top buggy, one light dray, three light harnesses and one heavy harness, which said chattel mortgage was, on the first day of August, 1899, filed in the office of John W. Switzer, clerk of the township of Shelby, in said Macomb county. That he executed and filed said chattel mortgage with intent to prefer the said William Schloesler over his other creditors.

"(*b.*) In that he made, executed and recorded the chattel mortgage above described with intent to hinder, delay and defraud your petitioners, his creditors.

"(*c.*) In that he did, heretofore, to wit, on the — day of March, 1899, while insolvent, make, execute and deliver another chattel mortgage to Edward L. Truba, of Detroit, Michigan, in the sum of two hundred and fifty dollars, which mortgage covers and conveys every article located in and relating to said Toeppner's general store above described at Utica, Michigan, which mortgage was recorded on the 12th day of August, 1899, in the office of the above-named clerk, for Shelby township, after which last-named date it first became known to your petitioners who had not previously received actual notice of said transfer or assignment, nor had the said Truba previously taken notorious, exclusive or continuous possession of the property, covered by said chattel mortgage, which chattel mort-
gage the said Toeppner executed with the intent thereby to
3 prefer the said Truba over his other creditors, your petitioners and others, which chattel mortgage therefore constitutes an unlawful transfer of the said Toeppner's property within the meaning of the said act to establish a uniform system of bankruptcy throughout the United States.

"(*d.*) In that he made, executed, delivered and recorded the last above described chattel mortgage with intent to hinder, delay and defraud your petitioners and others of his creditors.

"(*e.*) In that he did, heretofore, to wit, on the fifth day of August, 1899, while insolvent, make, execute and deliver a third chattel mortgage to A. Krolik & Co., of Detroit, Michigan, in the sum of one thousand nine hundred eighteen and $\frac{61}{100}$ dollars, which chattel mortgage conveyed and covered all the said Toeppner's above-described stock of goods in his general store at Utica, Michigan, and also all book accounts and notes, together with all books of account and all other evidences of debt, and all other personal property of every

kind and nature which at any time may be added to or purchased for or used in connection with the said stock, which chattel mortgage was, on the fifteenth day of August, 1899, filed in the office of the said clerk of the said township of Shelby, which chattel mortgage constitutes a transfer of the said debtor's property and was made by him with intent to prefer the said Krolik & Co., over his other creditors, and is consequently an unlawful transfer within the meaning of the said act to establish a uniform system of bankruptcy throughout the United States.

"(*f.*) In that he executed the last above described chattel mortgage with intent to hinder, delay and defraud his creditors or part of them.

"(*g.*) In that while insolvent, he has suffered and permitted certain creditors to obtain preferences through legal proceedings, not having at least five days before a sale or final disposition of his property effected by such preferences, vacated or discharged such preferences, especially in that on or about the sixth day of September, David H. and John I. Crissman, copartners as Crissman & Son, of Utica, Michigan, secured a judgment against him in justices' court for the amount of $160.00; and about the same time the Warren Boot and Shoe Company, a corporation organized under the laws of the State of Massachusetts, secured a judgment against him in justices' court for the amount of $80.00, and another party whose name is unknown to your petitioners, secured a judgment about the same time against him to the amount of about $114.00. And, thereupon, the said judgment creditors swore out immediate executions and levied upon all the stock of the said defendant's general store, closed the same up for several days and took an inventory, after which the said defendant paid the amount of said judgment with costs and expenses. And the Coronet Corset Company on or about the 20th day of September, secured a judgment against the said defendant, in justices' court for the amount of $42.06, as your petitioners are informed and believe, which judgment remains unsatisfied, and three other cases are pending in justices' court in the city of

4 Mt. Clemens, said county and State, against the said defendant, the result of all which proceedings has been and will be to secure said illegal preferences for the said creditors, plaintiffs in said suits unless the said defendant shall be declared a bankrupt under the acts of Congress with regard to bankrupts.

"4. And your petitioners further show that the said chattel mortgages above described cover all the property of every name and nature possessed by the said Ferdinand Toeppner, with the exception of such property as is exempt under the laws of the State of Michigan from levy of execution; that the said chattel mortgages aggregate the sum of $3,168.61, which is nearly as much as the property covered thereby is worth; that the said Toeppner, at the time he executed said mortgages, and at the present time, was indebted in the sum of not less than six thousand dollars and was insolvent.

"5. That afterwards, and on or about the 15th day of September, 1899, the said Ferdinand Toeppner made, executed and delivered

to his son, William Toeppner, a bill of sale covering all of his said stock of goods in his said general store, and also all accounts and bills receivable for a consideration of sixty dollars, which he claims was due to his son for services rendered as clerk in said store, and the further consideration of a promissory note for $190.00, executed by the said son and delivered to him. And your petitioners further show that William Toeppner is a boy of about twenty-two years of age who lives at home with his father, and has been working as a clerk in said general store, and while your petitioners do not claim that the said bill of sale was made for an adequate consideration, they believe and charge that it was not made in good faith, but with intent to hinder, delay and defraud the creditors of the said Ferdinand Toeppner. And they further show that by the said bill of sale the said Ferdinand Toeppner conveyed all the property which he possessed, not exempt from execution, under the laws of the State of Michigan, and left himself totally without resources with which to pay your petitioners and his other creditors not preferred as above set forth, the amount of their just claims, or any part or portion thereof whatever.

Wherefore your petitioners pray that service of this petition with a subpœna be made upon the said Ferdinand Toeppner as provided in the acts of Congress relating to bankrupts, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

(Signed) C. ELLIOTT & CO.,
By CLIFFORD ELLIOTT.
W. H. KRUM & CO.,
By ALBERT H. KRUM.
SCHLOSS BROS.,
By ALBERT W. SCHLOSS.
GEORGE WETHERBEE & CO.,
By M. C. WETHERBEE, Jr.
PHELPS, BRACE & CO.,
By W. H. BRACE, *Pres't.*

A. G. PITTS, *Attorney.*

5 UNITED STATES OF AMERICA, } ss:
*Eastern District of Michigan, County of Wayne,* }

Clifford Elliott, Albert H. Krum and Albert W. Schloss, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true. Before me a notary public in and for said county this 30th day of September, A. D. 1899.

(Signed) OLIVER M. LEONARD,
*Notary Public, Wayne Co., Mich.*"

Process was served upon said Toeppner, October 2, 1899, and upon the 14th of October, said Toeppner filed his answer, which was in the following words and figures:

"The answer of Ferdinand Toeppner to the petition of Clifford

Elliott, William E. Saunders, William Radcliffe, and Edward W. Reynolds, general partners, doing business as C. Elliott & Co., Albert H. Krum, doing business as A. H. Krum & Co., Albert W. Schloss and Murray E. Schloss, copartners as Schloss Brothers, George C. Wetherbee & Co., a corporation organized under the laws of the State of Michigan, and Phelps, Brace & Co., a corporation organized under the laws of the State of Michigan, to have the said respondent declared a bankrupt, this respondent reserving all rights of exceptions to the manifold errors and insufficiencies in said petition contained, for answer thereto says:

"First.

"That he admits the allegations contained in the first paragraph of said petition.

"Second.

"That he admits the allegations contained in the second paragraph of said petition.

"Third.

"That he denies that he was insolvent at the time of filing the said petition and that he had committed acts of bankruptcy within the meaning of the act of Congress, entitled, 'An act to establish a uniform system of bankruptcy throughout the United States.' He admits that he executed the chattel mortgage described in subdivision (*a*) of paragraph three of said petition, but he says that said chattel mortgage was given to secure the said William Schoesler for money borrowed by this respondent and that this respondent at the time of the execution of said mortgage had sufficient property over and above the amount secured by said mortgage to pay all his debts and he denies that said mortgage was executed for the purpose of hindering, delaying and defrauding the above-named petitioners, or any other person, and that said money secured by said mortgage was used to discharge legal debts against the said respondent.

"He admits the execution of the chattel mortgage to Edward L. Truba, of Detroit, Michigan, but he says that the said mort-
6 gage was given to secure the payment of money borrowed from the said Edward L. Truba, that it was executed in good faith without any attempt to hinder, delay or defraud the said petitioners or any other person, and that the said respondent had sufficient property to meet all his liabilities over and above said mortgage.

"He admits the execution of the chattel mortgage described in said petition, A. Krolik & Co., of Detroit, Michigan, but he denies that said mortgage was executed for the purpose of hindering, delaying or defrauding any of the said petitioners but was executed in good faith and for a valuable consideration.

"He admits that certain judgments were taken against him as described in said petition, but he says that said judgments were procured without his consent, and that with the exception of one judgment of $42.00, the said judgments have been discharged and paid.

"Fourth.

"That he admits that the aggregate of said mortgage is correctly stated in said petition, but he says that the whole of said property covered by said mortgages is worth about $7,000.00.

"Fifth.

"He admits the execution of the bill of sale to William Toeppner, his son, but he says that the said bill of sale was given to secure the sum for labor furnished to this respondent and that the said bill of sale was not executed for the purpose of hindering, delaying or defrauding the said petitioners or any other person.

"Therefore, the said respondent prays that the said petition be dismissed with costs.

"(Signed) FERDINAND TOEPPNER.

"UNITED STATES OF AMERICA,
"*Eastern District of Michigan, County of Wayne,* } *ss:*

"On this tenth day of October, 1899, before me a notary public in and for said county, personally appeared Ferdinand Toeppner, who made oath that he had heard read the foregoing answer by him subscribed and that the statements therein contained are true.

"(Signed) ISAAC N. PAYNE,
"*Notary Public, Wayne County, Michigan.*

"E. J. JEFFRIES,
"*Attorney for Respondent.*"

On the same day, Toeppner filed a demand for a jury trial which was in these words:

"UNITED STATES OF AMERICA:

"In the District Court of the United States for the Eastern District of Michigan.

"In the Matter of the Petition of CLIFFORD ELLIOTT ET AL. for the Adjudication of Ferdinand Toeppner, a Bankrupt.

"Now comes the said respondent, Ferdinand Toeppner, and demands a jury to try the issues raised in said cause.

"(Signed) E. J. JEFFRIES,
"*Attorney for Defendant, Ferdinand Toeppner.*"

7 November 14th and 15th, the issues were tried before a jury who returned a verdict of "not guilty."

A motion for a new trial was entered and overruled, and judgment entered, adjudicating that said Ferdinand Toeppner was not a bankrupt and dismissing the petition praying an adjudication of bankruptcy. The journal entry shown by the transcript of the record thus adjudging that said Toeppner was not a bankrupt is in these words:

"At a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room in the city of Detroit, in said district, on Monday, the fifteenth day of January, nineteen hundred.

"Present: The Hon. Henry H. Swan, district judge.

"In the Matter of the Petition of CLIFFORD ELLIOTT ET AL. to Have Ferdinand Toeppner Adjudicated a Bankrupt.

"In Bankruptcy.

"The court delivered judgment on motion for a new trial now argued and submitted. The same having been duly considered, it is now by the court ordered, adjudged and decreed that the same be and is hereby denied. This cause came on to be heard at Detroit, in said district, in said court, upon the petition of Clifford Elliott *et al.*, that the said Ferdinand Toeppner be adjudged a bankrupt, and a jury trial having been duly demanded by the respondents, and the said cause having been tried before a jury duly empaneled herein, and the said jury, after hearing the testimony of the petitioners and respondent, and the argument of counsel and charge of the court, after due deliberation, determined by their verdict that the facts set forth in said petition were not proven. It is, therefore, adjudged by the court that the said Ferdinand Toeppner was not a bankrupt, and that said petition be dismissed. Thereupon, twenty days are granted to settle a bill of exceptions and to perfect appeal."

On the same day, January 15, 1900, the appellants being petitioners below, filed a petition praying to be allowed an appeal to the circuit court of appeals, from the judgment refusing to adjudge the said Ferdinand Toeppner a bankrupt, and filed therewith an assignment of errors. No bill of exceptions was asked or taken and no writ of error was sought or allowed.

The appeal thus prayed was in due time allowed, and an appeal has been perfected by the due execution of the bond required by the order allowing the appeal. A transcript of the record from the district court has been filed in this court, which, in addition to the matters already stated, includes what purports to be all of the proceedings in the jury trial, as follows:

8 A. The evidence heard by the jury upon the issues submitted to it.

B. Exceptions reserved to evidence admitted or excluded.

C. The charge of the court.

D. Exceptions to the charge.

E. Requests for charges refused and exceptions to this action of the court.

The errors assigned relate exclusively to errors alleged to have been committed during the trial before the jury of the issues submitted. The transcript includes no bill of exceptions. The only certificate to the transcript is by the clerk of the district court, under the seal of the court, and is in these words:

"The District Court of the United States for the Eastern District of Michigan.

"In the Matter of the Petition of CLIFFORD ELLIOTT ET AL. to Have Ferdinand Toeppner Adjudicated a Bankrupt.

"In Bankruptcy.

"EASTERN DISTRICT OF MICHIGAN, *ss:*

"I, Darius J. Davison, clerk of the district court of the United States for said district, do hereby certify that the above and foregoing is a full and true transcript of the record in the matter above entitled; that I have carefully compared the same with the original records and files of said matter in my office, and find the same to be a true transcript of said originals and of the whole thereof, together with the original exhibits produced on the trial of said matter.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 20th day of April, A. D. 1900.

"[SEAL.] D. J. DAVISON, *Clerk.*"

After the transcript aforesaid had been duly filed in this court, the appellee moved the court to dismiss the appeal and to strike from the transcript so much as purports to set out the proceedings upon the jury trial of the issue submitted to the jury.

These motions came on to be argued, and were heard with the merits of the case and judgment has been reserved, the court being in doubt as to how the questions thus raised should be decided until it can obtain the instruction of the Supreme Court as to the jurisdiction of this court under the 25th section of the bankrupt act of 1898, to review the proceedings upon a jury trial, authorized by the 19th section of the same act.

It is accordingly ordered that the foregoing statement
9 of facts be certified to the Supreme Court, together with the following interrogatory:

Has this court, under the appeal granted from the judgment refusing to adjudicate Ferdinand Toeppner a bankrupt, authority to re-examine the proceedings upon the jury trial, and remand for a new trial if it shall appear from the transcript as certified to us, that there was error in instructions given or refused or in the admission or rejection of evidence?

HORACE H. LURTON,
HENRY F. SEVERENS,
WALTER EVANS,
*Judges of the U. S. Circuit Court of Appeals for the 6th Circuit, Sitting in said Cause.*

10 UNITED STATES OF AMERICA, } ss:
*Sixth Judicial Circuit,* }

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of C. Elliott & Co. *v.* Ferd. Toeppner, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 18 day of February, A. D. 1900.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of United States Circuit Court of Appeals*
*for the Sixth Circuit.*

[Endorsed:] United States circuit court of appeals for the sixth circuit. Questions certified to the Supreme Court of the United States.

Endorsed on cover: Certificate. File No. 18,126. U. S. C. C. of appeals, 6th circuit. Term No. 302. C. Elliott & Co. *et al.*, appellants, *vs.* Ferdinand Toeppner. Filed April 22nd, 1901.

No. 302 85

FILED
APR 19 1902
JAMES H. McKENNEY,
Clerk.

Brief of Brennan 26 for Appellee

# SUPREME COURT OF THE UNITED STATES.

IN BANKRUPTCY.

Filed April 19, 1902.

OCTOBER TERM, 1901.

No. 302.

C. ELLIOTT & CO., ET AL., APPELLANTS.

vs.

FERDINAND TOEPPNER, APPELLEE.

CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS—SIXTH CIRCUIT.

*BRIEF FOR APPELLEE.*

MICHAEL BRENNAN,
*Attorney for Appellee.*

ADOLPH SLOMAN,
*Of Counsel.*

POTTER PRINTING CO., DETROIT, MICH.

18,126.

# SUPREME COURT OF THE UNITED STATES.

IN BANKRUPTCY.

OCTOBER TERM, 1901.

**No. 302.**

C. ELLIOTT & CO., ET AL., APPELLANTS.

vs.

FERDINAND TOEPPNER, APPELLEE.

CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS—SIXTH CIRCUIT.

## *BRIEF FOR APPELLEE.*

The Appellants filed a petition in the District Court of the United States for the Eastern District of Michigan, to have the Appellee adjudged a bankrupt. A jury being demanded by the Appellee, the case was tried before the Court and a jury, and was decided adversely to the Appellants. An appeal was then taken within ten days by the Appellants to the Circuit Court of Appeals, Sixth Circuit. No bill of exceptions was settled nor case made, nor was the record certified to other than by the Clerk of the Court in the

usual way. A motion was there made by the Appellee to dismiss the appeal and strike from the record the testimony appearing therein for the following reasons:

1. Because no case was made or settled by the Court so that the proceedings alleged to have been had and taken upon the trial of said cause in the Court below are not duly authenticated.

2. Because a review of the rulings below upon a jury trial in bankruptcy can only be had upon a bill of exceptions and a writ of error.

3. Because there is no such authenticated record before this Court and the proceedings had and taken upon the trial of said cause as will warrant the Court in reviewing the same on this appeal.

These are involved in the question certified to this Court. This question came up squarely in the Circuit Court of Appeals, Third Circuit, in the case of Duncan vs. Landis, 5 A. B. R., page 649. In that case a trial was had before a jury, exceptions taken and bill sealed, both as to admission of evidence and as to instructions to the jury. It was contended that although the only method by which a jury trial could be reviewed, if at all, was by writ of error, there was no statute authorizing the issuing of such writ in Bankruptcy Cases. After a full consideration of the subject, it was held, that the appellate jurisdiction given to Circuit Courts of Appeals by Section 24 is applicable to all "controversies arising in bankruptcy proceedings," and where the right to a trial by jury on the ground of insolvency exists under Section 19, it is according to the course of the common law, *and a review of the rulings in matters of law on such trial can only be had upon a writ of error, which is the proper remedy in such case.*

As the decision of the Court in that case is so full and complete and to the point, we content ourselves with the mere citation of same.

Respectfully submitted,

MICHAEL BRENNAN,
*Attorney for Appellee.*

ADOLPH SLOMAN,
*Of Counsel.*

# Supreme Court of the United States.

No. 85.—October Term, 1902.

C. Elliott & Co. et al., Appellants, vs. Ferdinand Toeppner. } On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

[December 8, 1902.]

Elliott and others filed their petition for the adjudication of Ferdinand Toeppner as a bankrupt, in the District Court of the United States for the Eastern District of Michigan, which averred that Toeppner was insolvent and that he had committed certain enumerated acts of bankruptcy under subdivisions (1), (2) and (3) of section 3*a* of the bankruptcy act. Toeppner answered denying that he was insolvent at the time the petition was filed, and denying insolvency at the time of the commission of the acts charged under subdivisions (2) and (3); and at the same time filed in writing his demand for a jury trial. The issues were tried before a jury, who returned a verdict of not guilty. A motion for new trial was made and overruled, and the court entered judgment adjudging that Toeppner was not a bankrupt, and dismissing the petition. From this judgment petitioners prayed an appeal to the Circuit Court of Appeals accompanied with an assignment of errors. No bill of exceptions was asked or taken, and no writ of error was asked or allowed.

The appeal was allowed and duly perfected by giving the bond required, and a transcript of the record was filed in the Circuit Court of Appeals for the Sixth Circuit, which included, in addition to the proceedings before stated, what purported to be the evidence heard by the jury; exceptions reserved to evidence admitted or excluded; the charge of the court, and exceptions; and instructions asked and refused, and exceptions.

The errors assigned related exclusively to errors alleged to have been committed during the trial, before the jury, of the issues submitted.

By the certificate to the transcript by the clerk of the District Court, and under its seal, it was certified that "the above and foregoing is a full and true transcript of the record in the matter above entitled; that I have carefully compared the same with the original records and files of said matter in my office, and find the same to be a true transcript of the said originals and of the whole thereof, together with the original exhibits produced on the trial of said matter."

After the transcript had been filed Toeppner moved the Circuit Court of Appeals to dismiss the appeal, and to strike from the transcript so much

as purported to set out the proceedings on the jury trial of the issues submitted to the jury. The motions coming on to be argued the court, being in doubt, certified a statement of the foregoing facts to this court, together with the following question:

"Has this court, under the appeal granted from the judgment refusing to adjudicate Ferdinand Toeppner a bankrupt, authority to re-examine the proceedings upon the jury trial, and remand for a new trial if it shall appear from the transcript as certified to us, that there was error in instructions given or refused or in the admission or rejection of evidence?"

Mr. Chief Justice FULLER delivered the opinion of the Court:

The judgment of the District Court was a final judgment that Toeppner was not a bankrupt, and that the petition be dismissed. The question is whether the judgment could be otherwise revised than on writ of error, for if a writ of error should have been brought, then the Circuit Court of Appeals had no authority to re-examine the proceedings on the jury trial, on appeal, or to remand for a new trial because of error in instructions given or refused, or in the admission or rejection of evidence, exceptions not having been preserved by a bill of exceptions.

Section 18*d* of the bankruptcy act provides: "If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition."

By section 1 of the act "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient to pay his debts."

By subdivision (1) of section 3 an act of bankruptcy is committed when a person has "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them;" but by clause *c* "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him." *West Company* v. *Lea*, 174 U. S. 590.

Under subdivisions (2) and (3) insolvency must exist at the time of the commission of the acts specified.

In this case, so far as acts of bankruptcy under subdivision (1) were charged, insolvency at the time of the filing of the petition was denied,

and so far as acts of bankruptcy under subdivisions (2) and (3) were charged, insolvency at the time the acts were committed was denied.

The burden of proving solvency in proceedings under the first subdivision was on the alleged bankrupt by clause *c*, and on the petitioning creditors in proceedings under the second and third subdivisions, unless in the contingency named in clause *d*.

The issues presented by the pleadings were clearly defined, and Toeppner made written application for a trial by jury, to which he was entitled by section 19, which reads:

"SEC. 19. Jury Trials.—*a*. A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

"*b*. If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the District Courts within the jurisdiction of a Circuit Court of the United States, it may be certified for trial to the Circuit Court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such Circuit Court has or is to have a jury first in attendance.

"*c*. The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury."

The right to a trial by jury on written application thus given is absolute and cannot be withheld at the discretion of the court. In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.

Section 566 of the Revised Statutes provides that: "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

The District Courts as courts of bankruptcy are invested with "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings" in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration. The proceedings in administration of the estate are equitable in their nature, but the bankruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is de-

manded, it is demanded as of right, and the trial is a trial according to the course of the common law. This being so, judgments therein rendered are revisable only on writ of error. *Insurance Company* v. *Comstock*, 16 Wall. 258; *Parsons* v. *Bedford*, 3 Pet. 448; *Duncan* v. *Landis*, 106 Fed. Rep. 839.

By section 41 of the bankruptcy act of 1867 it was provided that the court should, if the debtor so demanded in writing, order a trial by jury to ascertain the fact of the alleged bankruptcy, and in *Insurance Company* v. *Comstock*, Mr. Justice Clifford, speaking for the court, said: "Such a provision is certainly entitled to a reasonable construction, and it seems plain, when it is read in the light of the principles of the Constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law." The first paragraph of section two of the act was referred to, which provided "that the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity," 14 Stat. 517, c. 176; and it was held that the case was excluded from the general superintendence and jurisdiction of the Circuit Court by the exception; and that even admitting that decrees in equity rendered in the District Court might be revised in a summary way if Congress should so provide, it was "clear that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the Circuit Court in that way, as the Constitution provides that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.' Two modes only were known to the common law to re-examine such facts, to wit: The granting of a new trial by the court where the issue was tried or to which the record was returnable, or, secondly, by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted." In these observations Mr. Justice Clifford affirmed the rulings

in *Parsons* v. *Bedford*, where Mr. Justice Story considered the Seventh Amendment in connection with the language of Article III and the judiciary act of 1789, and treated the last clause of the amendment as "a substantial and independent clause," pointing out that "the phrase 'common law' is used in contradistinction to equity, and admiralty, and maritime jurisprudence."

In *Duncan* v. *Landis* similar views as to review of judgments on verdicts in trials by jury demandable as of right were expressed by the Circuit Court of Appeals for the Third Circuit, whose opinion by Gray, J., contains a lucid exposition of the general subject.

We need not, however, be drawn into a discussion of the controlling force of the Seventh Amendment, as we think the provisions of the present bankruptcy act are consistent with the conclusions heretofore announced.

By the twenty-fourth section of the act the Supreme Court of the United States, the Circuit Courts of Appeals, and the Supreme Courts of the Territories are invested with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." And it is also provided, § 25*d*, that "controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

In *Bardes* v. *Hawarden Bank*, 175 U. S. 526, we held that the fifth and sixth sections of the judiciary act of March 3, 1891, were not changed by the bankruptcy act. The sixth section gives the Courts of Appeals jurisdiction to review by appeal or writ of error final decisions in the District and Circuit Courts in cases other than those provided for in the fifth section.

Section 24*b* of the bankruptcy act is: "The several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." This is confined to questions of law and does not contemplate a review of the facts. *Mueller* v. *Nugent*, 184 U. S. 1, 9.

Section 25*a* provides that: "Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Courts of Appeals of the United States, and to the Supreme Courts of the Territories, in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt: . . ."

The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court, and been recognized by

the legislation of Congress from the foundation of the government. *Dower* v. *Richards*, 151 U. S. 658, 663; *Wiscart* v. *Dauchy*, 3 Dall. 221.

So far from any restriction being imposed by section 25*a*, the language used is "appeals, as in equity cases," and on appeals in equity cases the whole case is open.

But Congress did not thereby attempt to empower the appellate court to re-examine the facts determined by a jury under section 19 otherwise than according to the rules of the common law. The provision applies to judgments "adjudging or refusing to adjudge the defendant a bankrupt," when trial by jury is not demanded, and the court of bankruptcy proceeds on its own findings of fact. In such case, the facts and the law are re-examinable on appeal, while the verdict of a jury on which judgment is entered concludes the issues of fact and the judgment is reviewable only for error of law.

And it follows that alleged errors "in instructions given or refused or in the admission or rejection of evidence" must appear by exceptions duly taken and preserved by bill of exceptions.

In *Denver First National Bank* v. *Klug*, 186 U. S. 202, the point raised in this case was not suggested. The question was whether the case as presented by the record could be brought by appeal directly to this court, and we held that it could not. The case did not come within section 5 of the judiciary act of March 3, 1891, nor within any provision of the bankruptcy act.

*The question is answered in the negative.*

True copy.

Test:

*Clerk Supreme Court, U. S.*